

CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 863

THE CITY OF NEW YORK, PETITIONER,

vs.

**MICHAEL FEIRING, TRUSTEE IN BANKRUPTCY
OF NATIONAL STUDIOS, INC.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED MARCH 22, 1941.

CERTIORARI GRANTED APRIL 14, 1941.

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TESTIMONY.

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United States Circuit Court of Appeals
FOR THE SECOND CIRCUIT

IN THE MATTER
of
NATIONAL STUDIOS, INC.,
Bankrupt,
CITY OF NEW YORK,
Claimant-Appellant.

Statement Under Rule 13.

This proceeding was commenced on February 17, 1940 by service upon the office of the Comptroller of the City of New York of a notice of motion dated February 17, 1940, and petition verified by the Trustee on February 15, 1940, objecting to the amount and to the priority of the proof of claim filed by the City of New York, appellant, for sales and business taxes. On April 1, 1940 a hearing was had before Hon. Robert P. Stephenson, Referee in Bankruptcy. The opinion of the Referee was handed down on June 6, 1940 and an order fixing the amount of the claim as stipulated to by the parties and granting priority thereto was made and filed on June 17, 1940. The Trustee's petition to review dated June 19, 1940 was filed on June 20, 1940 and the Referee's certificate was made and filed on June 21, 1940.

The matter came up before Hon. John W. Clancy, U. S. D. J., who, on August 8, 1940, rendered an opinion upon which an order was made under date of August 16, 1940 and entered on September 24, 1940 reversing the order of the Referee so far as it granted priority to appellant's claim for sales taxes. Appellant filed a notice of appeal from this order on October 3, 1940.

The Trustee appears by Benjamin Siegel, Esq., and claimant-appellant appears by William C. Chanler, Corporation Counsel of the City of New York. There have been no changes in either the original parties or counsel.

Proof of Claim of the City of New York.

B 202-10-38

72936

Claim No. 1515

IN THE MATTER

of

NATIONAL STUDIOS, INC.

226 West 56 Street

New York, N. Y.

Bankrupt.

File With
Hon. R. P. Stephenson,
Referee

U. S. Court House
Foley Square
New York, N. Y.

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Comes Samuel Orr, Special Deputy Comptroller of the CITY OF NEW YORK, a duly authorized agent for the City of New York in its behalf, and says that the above named bankrupt is justly and truly indebted to the City of New York for taxes as follows:

Nature of Tax Local Law Involved	Year or Taxable Period	Tax	Interest Penalty	Total
SALES TAX (M-6155)				
L.L. 20 of 1934—Amended	12/10/34-12/31/35	\$1,451.20	\$319.22	\$1,770.42
29 of 1935	1/ 1/36- 6/30/36	580.72	98.60	679.32
31 of 1936	7/ 1/36- 6/30/37	662.48	79.44	741.92
20 of 1937—Amended	7/ 1/37- 6/30/38	503.84	30.18	534.02
21 of 1938 (Ch. 41,	7/ 1/38- 1/10/39	161.47	3.22	164.69
Title "N" Administrative Code)				
Total Due for Sales Tax		\$3,359.71	\$530.66	\$3,890.37
BUSINESS TAX (M-12279)				
L.L. 9 of 1934	1933	\$ 65.11		\$ 65.11**
17 of 1934—Amended	1934	223.76		223.76**
32 of 1935	1935	167.43		167.43**
29 of 1936	1936	88.55		88.55**
22 of 1937	1937			00
20 of 1938 (Ch. 41,	1938	45.13		45.13
Title "O" Administrative Code)				
Total Due for Business Tax		\$589.98		\$589.98

*Not Included Above.

**Unpaid previous assessment (to be cancelled).

Total Claim as Indicated Above

\$4,480.35

Proof of Claim of the City of New York.

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Together with additional interest at $\frac{1}{2}\%$ per month until paid. Additional interest begins March 15, 1939.

That no part of said claim has been paid but that the same is due and payable at the office of the City Treasurer, 50 Lafayette Street, New York City.

That no security is held by the City of New York, and that there are no offsets or counterclaims.

Notice is hereby given that the Comptroller of the City of New York reserves all of the City's rights to make a determination of additional tax in accordance with the provisions of the Local Laws, and file an additional claim therefor.

8

Attention is hereby called to the provisions of the Local Laws of the City of New York authorizing the Comptroller to enforce payment of any unpaid tax due thereunder.

You are further advised that the claim of the City of New York is a prior claim and that no distribution of the taxpayer's assets may be made before the claim of the City of New York is paid.

SAMUEL ORR

SAMUEL ORR

SPECIAL DEPUTY COMPTROLLER
OF THE CITY OF NEW YORK

9

Sworn to and subscribed before me
this 20th day of March, 1939.

(COPY) IRVING SCHACHTER

by (COPY) EDWARD F. BENNETT
Review and Settlements Section

Receipt is acknowledged of the original of this proof of claim.

Dated, March 21, 1939.

Signed ROBERT P. STEPHENSON
Referee in Bankruptcy

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Notice of Trustee's Objection to City's Claim.**UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.****IN THE MATTER****of****NATIONAL STUDIOS, INC.,****Bankrupt.**

Notice of Hearing
 Re: Objection to
 Claim of the City
 of New York.

No. 72936

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SIRS:

PLEASE TAKE NOTICE that upon the annexed objection of the Trustee, duly verified the 15 day of February, 1940, and upon all the proceedings heretofore had herein, a motion will be duly made at a Term of this Court, to be held before Hon. Robert P. Stephenson, Referee in Bankruptcy, at Room 201, United States Courthouse, Foley Square, in the Borough of Manhattan, City, County and State of New York, on the 1st day of March, 1940, at 2:00 o'clock in the afternoon of said day or as soon thereafter as counsel can be heard, for an order expunging the claim of The City of New York filed as an alleged priority claim against this estate in the sum of \$4,480.35 and adjudging that said claim is not entitled to priority of payment, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, February 17th, 1940.

Yours, etc.,

BENJAMIN SIEGEL,
 Attorney for Trustee,
 Office and P. O. Address,
 280 Broadway,
 Borough of Manhattan,
 City of New York.

Petition.

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To:

THE CITY OF NEW YORK,
Claimant,
50 Lafayette Street,
New York City.

Petition.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

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IN THE MATTER
of
NATIONAL STUDIOS, INC.,
Bankrupt.

TO HONORABLE ROBERT P. STEPHENSON, REFEREE IN BANK-
RUPTCY:

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MICHAEL FEIRING, Trustee herein, does hereby object to the proof of debt filed by The City of New York as a priority creditor against this estate in the sum of \$4,480.35.

That said objection is made upon the following grounds:

1. That this estate is not indebted to said alleged creditor in the amount set forth in said proof of debt.

2. That the obligation set forth in said proof of debt is not entitled to priority of payment under the Bankruptcy Act.

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Petition.

WHEREFORE, the Trustee respectfully prays that the claim of The City of New York filed as an alleged priority claim against this estate in the sum of \$4,480.35 be expunged from the claims on file herein and no dividend declared thereon, and said claim be adjudged not a priority claim against this estate.

Dated, New York, February 15th, 1940.

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MICHAEL FEIRING,
Trustee.

City, County and State of New York, ss.:

MICHAEL FEIRING, being duly sworn, deposes and says: That he is the Trustee herein; that he has read the foregoing objections and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

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MICHAEL FEIRING.

Sworn to before me this
15th day of February, 1940.

EUGENE A. CANTOR,
Notary Public, Westchester County.
N. Y. Co. Clks. No. 1155, Reg. No. 1C673.
Commission Expires March 30, 1941.

Minutes of Hearing Before Referee In Bankruptcy.

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**UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.**

IN BANKRUPTCY

**IN THE MATTER
of
NATIONAL STUDIOS, INC.,
Bankrupt.**

20

Before: HON. ROBERT P. STEPHENSON, Referee.

**United States Court House,
Foley Square, New York, N. Y.,
April 1, 1940,
at 2:00 p. m.**

**ADJOURNED HEARING ON MOTION TO EXPUNGE THE CLAIM
OF THE CITY OF NEW YORK**

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PROCEEDED PURSUANT TO ADJOURNMENT

APPEARANCES:

BENJAMIN SIEGEL, Esq., Attorney for the Trustee.

**WILLIAM C. CHANLER, Esq., Corporation Counsel; by M. L.
Heath, Esq., Assistant Corporation Counsel.**

Minutes of Hearing Before Referee in Bankruptcy.

Mr. Heath: The City states that the amount of Sales Tax due, as stipulated to with Mr. Siegel, is \$796 inclusive of interest. The Business Tax has also been agreed to in the amount of \$323.56 inclusive of interest.

Mr. Siegel: In order to get the record clear, I take it that what you mean, Mr. Heath, is merely that with reference to the Business Tax claim included in the claim filed and under objection the amount therein claimed should be reduced to the sum of \$323.56.

Mr. Heath: We will enter into a written stipulation.

Mr. Siegel: I just want to get the record clear as to what the claim is.

Mr. Heath: All right; that is correct.

Mr. Siegel: With reference to the claim of the Sales Tax you are consenting that it be reduced to the sum of \$796; is that correct?

Mr. Heath: That is correct.

Mr. Siegel: As far as the trustee is concerned we consent thereto, but we maintain that the City of New York is not entitled to any priority of payment for the alleged Sales Tax. With reference to the Business Tax we concede it is entitled to priority of payment. Is that understood, Mr. Heath?

Mr. Heath: Yes.

Mr. Siegel: Do you concede, Mr. Heath, that this claim is based upon the fact that the bankrupt was a vendor under the statute?

Mr. Heath: That is, the taxes represented by this \$796 are taxes imposed by the local sales tax law upon National Studios as a vendor of tangible personal property upon its receipts from the sales of tangible personal property. We concede that.

The Referee: Is there anything else?

Mr. Heath: I would just like to say this: I wonder if we could have the trustee's accountant take the stand just

Minutes of Hearing Before Referee in Bankruptcy.

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for the purpose of clarifying one or two questions for the record as to those receipts on which this tax is imposed.

Mr. Siegel: Is that necessary? Tell us what you want to prove, off the record.

(Then followed discussion off the record.)

The Referee: It is stipulated that there is not and has not been in the possession of the trustee any sums collected by the bankrupt on account of sales taxes. Is that all right?

Mr. Siegel: That is all right.

Mr. Heath: All right.

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SIDNEY LAUTT, 143 West 170th Street, New York City, called as a witness in behalf of the City of New York, being first duly sworn, testified as follows:

Direct Examination by Mr. Heath:

Q. You are the accountant for the trustee? A. I am employed by the accountant for the trustee.

Q. Who are those accountants? A. Radin & Goldstein.

Q. You are familiar with the books of this bankrupt in possession of the trustee? A. I am.

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Q. Can you tell us whether those books show that the bankrupt prior to the filing of the petition in bankruptcy charged sales taxes on its sales on tangible personal property? A. It did.

Q. It entered them in the books of account? A. Yes.

Q. Do you know whether those books show the collection of such sales taxes by the bankrupt? A. I don't know.

Q. Is there any book of the bankrupt that would show that? A. I don't believe there is one book. It may be—the information may be obtained by examining several and connecting them up.

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Minutes of Hearing Before Referee in Bankruptcy.

Q. From your examination you cannot state one way or the other as to whether the bankrupt collected those taxes?

A. At present I can't. I may be able to upon a further examination of the books.

Cross Examination by Mr. Siegel:

Q. Are you a certified public accountant? A. No.

Q. Are you a public accountant? A. Yes.

Q. You examined books on numerous occasions? A. Yes, on occasions.

29 Q. What do the books reflect as being the amount owing for sales tax? A. \$154.41.

The Referee: I will take the stipulation on the amount.

Mr. Siegel: That is all right.

The Referee: Next witness.

PHILIP J. GREENBERG, 80 St. Marks Place, Staten Island, New York, called as a witness in behalf of the City of New York, being first duly sworn, testified as follows:

30 Direct Examination by Mr. Heath:

Q. You were the bookkeeper for the bankrupt, Mr. Greenberg? A. Yes, sir.

Q. About what period? A. From about April until the business was closed up.

Q. April of what year? A. 1939.

Q. Are you familiar with the books of the bankrupt? A. Yes, sir.

Q. Did you keep charge of them? A. Yes, sir.

Q. Do you know whether or not city sales tax entries were made in these books? A. City sales tax was set up as a liability. That I know.

Minutes of Hearing Before Referee in Bankruptcy.

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Q. When a sale of tangible personal property was made?

A. That is right. A separate liability was set up.

Q. In what book? Is the daily journal here? A. That is a sales book. Daily sales were analyzed—daily sales and monthly sales.

Q. Those entries were made prior to the actual receipt of the cash? A. You had to show a certain liability before you collected. Any time an invoice went through the actual charge was sent through and the—let us assume a bill of \$5. We set up \$5, and ten cents was tax. First the invoices were made up, and then the invoices were entered on this sheet.

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Q. Prior to payment? A. Yes.

Q. Do you know whether there was any entry made of sales taxes collected? A. When a customer paid the customer was credited, and the cash receipts was debited. Part of the receipts was tax and part actual merchandise.

By the Referee:

Q. You mean cash was charged for that amount. You credit the customer and charge cash? A. Yes.

By Mr. Heath:

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Q. What method was used to show in the books the payment of sales tax to the city? A. There was no separate system of breaking down the receipts as to city sales tax and the actual sale. The check that was collected included both the city sales tax and the actual invoice.

Q. In this record from which the bills and invoices were made up—that record listed the sales tax as charged separately from the sales price? A. Yes, the invoice, yes.

Q. Did you pay city sales taxes based upon that entry? That is what the books reflect, rather than paying the city based upon an entry of sales taxes collected? You paid the city on the basis of sales taxes charged? A. Yes.

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Minutes of Hearing Before Referee in Bankruptcy.

Q. As far as you know, there was no record of actual sales taxes collected as sales taxes, is that right? A. You can if you want to do it. It will take a lot of work. You can go through each invoice, and as it was paid you can deduct your sales tax. Those that weren't paid are still outstanding.

Q. On these bills collected the corporation did not keep separately from the rest of the money received that which was earmarked for taxes? A. No, that was put in regular general cash.

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Q. As a matter of practice, therefore, the corporation would generally have collected the sales taxes, would it not? A. In the regular run of business, yes.

Q. Along with the sales price as listed on the bill or invoice? A. That is right. It was a liability of the customer.

Mr. Heath: That is all.

(Then followed argument off the record.)

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The Referee: It is stipulated that the \$796 due to the City of New York on account of sales tax is based upon sales made by the bankrupt amounting to \$39,800. Of those sales the bankrupt collected \$60 taxes on sales amounting to \$3,000. On the balance of the sales it collected no tax. Of the tax collected by the bankrupt none of it came into the possession of the trustee.

Is that all right?

Mr. Siegel: Yes, that is all right.

Mr. Heath: All right.

(Then followed argument off the record.)

The Referee: Submit your briefs.

(THE HEARING WAS CLOSED.)

Opinion of Referee In Bankruptcy.

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UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of

NATIONAL STUDIOS, INC.,

Bankrupt.

In Bankruptcy,
No. 72936.

Referee's Opinion
on Objection to
Claim of City of
New York.

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On March 21, 1939 the City of New York filed a claim asserting that the bankrupt is justly and truly indebted to the City of New York for taxes in the total amount, including interest, of \$3,890.37. It asserts that this is for sales taxes over periods beginning December 10, 1934 and ending January 10, 1939. It was stipulated that the total claim for sales taxes be compromised for the amount of \$796; that of this amount the bankrupt failed to collect from its vendees the sum of \$736; that the bankrupt did collect the remaining \$60 from its vendees; that no part of this \$60 was received by the trustee. The trustee objects to the allowance of this claim as a priority tax claim and contends that it is allowable only as a general claim.

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BENJAMIN SIEGEL, Esq., For the Trustee.

WILLIAM C. CHANLER, Esq.,

By M. L. Heath, Esq.,

Of Counsel,

For the City of New York.

40

Opinion of Referee in Bankruptcy.

STEPHENSON, Referee:

Since the total amount of the claim has been compromised for \$796 without allocation of parts thereof over any of the periods between December 10, 1934 and January 10, 1939 it cannot be determined which one of the various local sales tax laws applies. Local Law No. 21 for the year 1938 which took effect on July 1, 1938 provides in Section N41-2.0, sub-division 4-d thereof, that "the vendor shall be liable for the collection thereof and for the tax". If this law applied to the whole claim of the City of New York I should have no doubt that the bankrupt is liable for a tax as he is made so liable by the express words of the statute. But since it cannot be assumed that the bankrupt made the sales for which the City asserts its claim after July 1, 1938 it cannot be held that Local Law No. 21 for the year 1938 is applicable to the claim of the City of New York.

The previous local laws applicable are No. 24 for the year 1934 and No. 20 for year 1937. These laws have no provision similar to the provision above quoted in Local Law No. 21 for the year 1938. The question is whether under these laws the vendor's liability is a liability only as a collector of taxes for the City of New York. By the Chandler Act, which applies in this case since the petition was filed after that Act became effective, "taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof" are given a priority. The priority given by the previous Act to debts due a State or any subdivision thereof which by the laws of such State are given priority no longer exists under the Chandler Act. It is therefore essential to determine whether the claim of the City of New York is a claim for a tax legally due and owing by the bankrupt or whether it is a claim against the bankrupt only as a collector of such taxes.

The provisions of Local Law No. 24 for the year 1934 and Local Law No. 20 for the year 1937 provide that every vendor is to file with the Comptroller a return of his re-

Opinion of Referee in Bankruptcy.

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ceipts and of the taxes payable thereon and that at the time of filing a return of receipts each vendor shall pay to the Comptroller the taxes imposed by these local laws upon the receipts required to be included in such return and that all taxes for the period for which a return is required to be filed shall be due from the vendor and payable to the Comptroller without regard to whether a return is filed or whether the return correctly shows the receipts and the taxes due thereon. It is further provided as follows:

“Whenever any vendor or purchaser shall fail to collect and pay over any tax and/or to pay any tax or penalty imposed by this local law as in this local law provided, the corporation counsel shall, upon the request of the comptroller, bring an action to enforce the payment of the same.” 44

An additional remedy is provided by the issuance of a warrant to levy upon and sell the real and personal property of the vendor or purchaser for the payment of the amount of the tax. These provisions of the law impose two liabilities upon the vendor: one is to collect the tax from the vendee and pay it to the City; the other liability is to pay the City the amount of the tax whether the vendor collects it or not. This latter obligation is a tax legally due and owing by the bankrupt. Such was the reasoning of the Court in *Matter of Atlas Television Co., Inc.*, 273 N. Y. 51, and since the claim of the City of New York expressly claims that the bankrupt is justly and truly indebted to it for taxes the claim is entitled to priority. 45

Had the City of New York elected to claim for the vendor's liability as its collection agent its claim could have been allowed only as a general claim. The objection of the trustee is therefore overruled and the claim allowed as a tax claim entitled to the priority granted by Section 64 (a) of the Bankruptcy Act. Settle order on notice.

Dated, New York, June 6, 1940.

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Order of Referee, Filed June 18, 1940.

**UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.**

IN THE MATTER

of

**NATIONAL STUDIOS, INC.,
Bankrupt.**

No. 72936

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The City of New York, having filed with the Referee on March 21, 1939, a proof of claim alleging that the bankrupt is justly and truly indebted to the City of New York for sales taxes which accrued over the period beginning December 10, 1934 and ending January 10, 1939, under Local Laws No. 20 of 1934, as amended, No. 29 of 1935, No. 31 of 1936, No. 20 of 1937, as amended, and No. 21 of 1938, in the amount of \$3,359.71, principal, and \$530.66, interest, or \$3,890.37, total, and for business taxes which accrued during the period 1933-1938, under Local Laws No. 9 of 1934, No. 17 of 1934, as amended, No. 22 of 1935, No. 29 of 1936, No. 22 of 1937 and No. 20 of 1938, in the amount of \$589.98, principal, and the Trustee, by notice of motion dated February 17, 1940 and petition verified February 15, 1940, having moved for an order expunging said proof of claim of the City of New York and adjudging that said proof of claim is not entitled to priority of payment, and after hearing Benjamin Siegel, Esq., attorney for the Trustee, in support of the motion and William C. Chanler, Esq. (Morris L. Heath, of counsel) in opposition thereto, and the parties having stipulated in open Court that the amount of business taxes alleged to be due in said proof of claim be re-

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Order of Referee, filed June 18, 1940.

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duced to \$323.56, and the amount of sales taxes alleged to be due in said proof of claim be reduced to \$796.00, which amount of sales taxes is due from the bankrupt as a vendor at retail of tangible personal property, and consists of the sum of \$736.00 that the bankrupt failed to collect from its vendees and \$60.00 that the bankrupt did collect from its vendees, but no part of which was received by the Trustee, and due deliberation having been had and the opinion of the Referee having been filed,

Now, it is hereby:

50

ORDERED, that the claim of the City of New York for sales taxes herein be, and the same hereby is, allowed as a claim entitled to priority under Section 64a(4) of the Bankruptcy Act as amended by the Chandler Act in the sum of \$796.00, and it is further

ORDERED, that the claim of the City of New York for business taxes be, and the same hereby is, allowed as a claim entitled to priority under Section 64a(4) of the Bankruptcy Act as amended by the Chandler Act in the sum of \$323.56, and it is further

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ORDERED, that interest on the aforesaid claims of the City of New York be, and the same hereby is, allowed at the rate of 6% per annum from April 1, 1940, the date of the stipulation of the parties in open Court agreeing to the amounts of the respective claims.

Dated, June 17, 1940.

R. P. STEPHENSON,
Referee in Bankruptcy.

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Trustee's Petition for Review.

**UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.**

IN THE MATTER

of

**NATIONAL STUDIOS, INC.,
Bankrupt.**

No. 72936

Petition to Review
Order of the
Referee.

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**TO HONORABLE ROBERT P. STEPHENSON, REFEREE IN BANK-
RUPTCY:**

The petition of Michael Feiring respectfully shows to this Court and alleges:

1. That petitioner is the Trustee in Bankruptcy herein, duly qualified and now duly acting as such.

54 2. That in the course of the proceedings herein an order was duly made and entered herein by Hon. Robert P. Stephenson, Referee in Bankruptcy herein, on the 17th day of June, 1940.

3. Annexed hereto, marked Exhibit "A" and made part hereof is a true copy of said order.

4. That said order was and is erroneous in that:

(a) It is contrary to the evidence adduced and the weight of the evidence.

(b) It is contrary to law.

Trustee's Petition for Review.

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(c) The Referee erred in allowing the claim of the City of New York for sales tax as a priority claim against this estate under Section 64a of the Bankruptcy Act and in overruling the objection of the Trustee filed to said claim.

(d) The Referee erred in holding that the claim of the City of New York was for a tax due and owing by the bankrupt.

(e) That the Referee erred in failing to find that the claim of the City of New York was for a debt due and owing by the bankrupt to the City of New York.

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WHEREFORE, petitioner feeling aggrieved because of said order prays that the same be reviewed as provided in Section 39c of the Bankruptcy Act and the amendments thereto.

Dated, New York, June 19th, 1940.

MICHAEL FEIRING,
Petitioner.

City, County and State of New York, ss.:

MICHAEL FEIRING, being duly sworn, deposes and says; that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

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MICHAEL FEIRING.

Sworn to before me this
19th day of June, 1940.

DAVID N. WEISBAND,
Notary Public.

Kings Co. Clk. No. 325, Reg. No. 1061.
N. Y. Co. Clk. No. 189, Reg. No. 1-W-169.
Commission expires March 30, 1941.

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Exhibit "A"

(Order of Hon. Robert P. Stephenson, Referee in Bankruptcy, dated June 17, 1940—printed in record on page 16.)

Referee's Certificate on Petition for Review.**UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.**

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IN THE MATTER**of****NATIONAL STUDIOS, INC.,
Bankrupt.****In Bankruptcy,
No. 72936.****Referee's Certificate on Petition
to Review Referee's Order.**

**TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW
YORK:**

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Pursuant to the Petition to Review herein, I Hereby Certify the following to this Court:

1. Petition to Review of Michael Feiring, the trustee herein, verified June 19, 1940;
2. Order of the Referee, dated June 17, 1940, to be reviewed by this Petition;
3. Petition of Michael Feiring, trustee herein, verified February 15, 1940, and notice of motion dated February 17, 1940;

Referee's Certificate on Petition for Review.

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4. Claim of the City of New York, sworn to March 20, 1939;

5. Transcript of the evidence;

6. Referee's opinion dated June 6, 1940;

The question presented is whether or not the Referee erred in making the order to be reviewed herein.

Respectfully submitted,

Dated, New York, June 21, 1940.

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R. P. STEPHENSON,
Referee in Bankruptcy.

To Be Placed on Bankruptcy Motion Calendar for Hearing on Wednesday, June 26, 1940, at 10:30 A. M. Notice Thereof Given by Mail to: Benjamin Siegel, attorney for Trustee, 280 Broadway, New York City; and William C. Chanler, Corporation Counsel for City of New York, Municipal Building, New York City.

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Opinion of John W. Clancy, D. J.

**UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.**

IN THE MATTER

of

**NATIONAL STUDIOS, INC.,
Bankrupt.**

No. 72936

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OPINION**CLANCY, D. J.:**

The City of New York has filed a claim for Sales Tax against this bankrupt which was stipulated to be Seven hundred ninety-six (\$796.00) Dollars, Sixty (\$60.00) Dollars of which the bankrupt had collected from its customers but failed to pay to the City, and the rest representing the sum computed on its sales which the bankrupt failed to collect from its customers. The Referee granted priority to the claim and the trustee appeals. The City's claim covers the period from 1934 to 1938 and the Referee notes that the 1938 law, which took effect on July 1 of that year, provides that "the vendor shall be liable for the collection thereof and for the tax", language not found in the earlier local laws under which the Sales Tax is imposed. We do not think the stated language of the 1938 statute, torn from its setting in the law, or the issue of time has importance in this decision.

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In *Matter of Lazanoff*, 84 F. (2d) 982, the Court describes the City's contention there as follows: "That its claim against the vendor is entitled to priority under Section 64B (6) or (7) of the Bankruptcy Act as being both a claim

'for taxes due and owing by the bankrupt to the City of New York or a claim by a person who, under the Laws of the State of New York, is entitled to a priority.'" The Court held that the claim was "not a tax entitled to a priority under Section 64B (6) nor a debt covered by the State Law under Section 64B (7) of the Bankruptcy Act", and priority was denied the claim. Certiorari was denied by the Supreme Court, 299 U. S. 583. When this decision was handed down, the Bankruptcy Act, Section 64B (7) gave priority to "debts owing to any person who, by the Laws of the States or the United States, is entitled to priority". In December, 1938, the Court of Appeals decided the *Matter of Atlas Television Co.*, 273 N. Y. 51. They noticed the *Matter of Lazaroff*, supra; said that the vendors obligation is "in the nature of a tax" stated the vendor's obligation under the local law; concluded that the City was sovereign when it collected the obligation imposed by its local Sales Tax Law on its inhabitants and concluded finally: "If the City has no priority in collecting the claim founded on this application, the other creditors of the vendor share in the money collected by the vendor for payment to the City. Fine-spun distinctions are here out of place. The local law provides that 'vendor shal pay the tax' and the City is entitled as sovereign to priority for such payment." The Court gave the City's assessment and levy under the local Sales Tax Law the character of the action of a sovereign by holding that the City acts as a sovereign when it "imposed the obligation * * * and when it collects that obligation" and concluded that since the sovereignty has a preference in collection without statute (*Matter of Carnegie Trust Co.*, 206 N. Y. 390) priority attaches to the City's claim. In *Merchants Refrigerating Co. v. Taylor*, 275 N. Y. 113, the Court of Appeals adverted to its decision in the *Atlas Television* case and said that "that decision did not hold that the Sales Tax is imposed on the vendor

but only that he is under a duty to pay the tax to the City whether or not the vendor collects from the purchaser." This was stated by the Court as a complete answer to the contention that the appellant put forth that it was taxed twice on its gross receipts; once by the sales tax and once by the utility tax. Even more clearly in *Kesbec, Inc. v. McGoldrick*, 278 N. Y. 293, the same Court held the Sales Tax did not fall on the vendor. The equities of that case stirred a strong dissenting opinion, the language of which shows that the majority considered the *Atlas Television* and held that the Court had never decided that the incidence of the Sales Tax was on the vendor.

We have cited *Merchants Refrigerating Co. v. Taylor* and *Kesbec Inc. v. McGoldrick* at this point to emphasize what the Court of Appeals actually held in the *Atlas Television* case. The decision was only an affirmative answer to the question certified by the Appellate Division which was: "Is the claim of the City for sales tax which the assignor was obligated to pay entitled to a preference in the case of a general assignment?" The Appellate Division had vouchsafed no opinion when it decided the case (248 A. D. 853) so we have no basis for expanding or defining the sense of its simple question nor for conjecturing the subject matter of its doubts.

After that decision, the City of New York again applied for certiorari of the Lazaroff decision. The Court had, as we have stated, once denied certiorari, indicating its agreement with the Circuit Court. It now granted certiorari and said: "The decree of the Circuit Court of Appeals is reversed and the case is remanded to the District Court for further proceedings. *Re Atlas Television Co.*; 273 N. Y. 51." This later application for certiorari by the City was based on two grounds; one that a vendor's obligation to pay the City sums collected from purchasers, pursuant to

the Sales Tax Law was a tax and not a debt, and, two, that the City was a person, who, by the laws of the States, is entitled to priority under Section 64B(7) of the Bankruptcy Law as it then stood. In its petition for certiorari, the City said: "In view of the opinion in the *Atlas Television* case just referred to us, petitioner submits that the opinion of the Circuit Court of Appeals, Second Circuit, in the instant case is clearly wrong on both points decided and it is out of harmony with the law of the State as laid down by this Court of last resort. Your petitioner desires to point out, moreover, that even if the decision of the State Court on whether the claim is or is not a tax be deemed binding on the Bankruptcy Court, still the decision of the State Court, that the 'City is a person who, by the laws of the State is entitled to priority' is very definitely binding on the Bankruptcy Court by § 64B(7) of the National Bankruptcy Act."

The only conclusion which a District Judge logically can derive from this history which we have set forth at length is that the Supreme Court reversed the *Lazaroff* case solely on the state court's determination, as a matter of State Law, that the amount collected by the vendor, pursuant to the provisions of the local Sales Tax Law, and in his hands, or uncollected by him and due from him—as an insurer, the Court said in *McGoldrick v. Berwin-White Co.*, 309 U. S. 33, at 43,—was a debt entitled to priority by the Law of New York State and, therefore, entitled to priority under § 64B(7) of the Bankruptcy Act as it then stood. In expounding this argument in the *Atlas Television* case, the court used somewhat indefinite language because the argument required generalization. Whatever vice can be made to appear in it was cured by its own effort in *Merchants Refrigerating Co. v. Taylor*, *supra*, and *Kesbec, Inc. v. McGoldrick*, *supra*. Further, the Supreme Court has concluded

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Opinion of John W. Clancy, D.J.

that the New Sales Tax is a tax on the purchaser. *McGoldrick v. Berwin-White Co.*, supra. While that conclusion was possibly unnecessary to its decision in that case, it was of importance in its exposition. We, therefore, may not conclude that it had any other idea when it reversed the *Lazaroff* case. We think the conclusion we have reached is the only one consonant with the original denial of certiorari by it in the *Lazaroff* case and the subsequent grant of the writ and reversal following the *Atlas Television* decision and with its subsequently expressed opinion.

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The present Bankruptcy Law, Section 64(5) accords priority only to debts to which it is given by the Laws of the United States, so that the claim of the City against this bankrupt for unpaid Sales Taxes now has no priority. *Nolte v. Hudson Navigation Co.*, 8 F. (2d) 859; *General Merchandising Co.*, 32 Fed. Supp. 805.

Dated: New York, N. Y., August 8, 1940.

JOHN W. CLANCY (Signed),
United States District Judge.

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**Order of Clancy, D. J., Dated August 16th, 1940,
Appealed From.**

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At a Stated Term of the United States District Court, held in and for the Southern District of New York, at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, on the 16th day of August, 1940.

Present: Hon. JOHN W. CLANCY, District Judge.

IN THE MATTER

of

NATIONAL STUDIOS, INC.,

Bankrupt.

Order Granting
Petition to Review

No. 72936

80

Michael Feiring, Trustee herein, having duly filed a petition to review the order of Hon. Robert P. Stephenson, Referee in Bankruptcy, dated June 17th, 1940, allowing the claim of The City of New York for Sales Tax in the sum of \$796.00 as a claim entitled to priority under Section 64a (4) of the Bankruptcy Act, and the Referee having thereafter duly issued a certificate on said petition to review, and same having duly come on for hearing before the undersigned on the 24th day of July, 1940.

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Now, upon reading and filing the certificate of Hon. Robert P. Stephenson, Referee in Bankruptcy, dated June 21st, 1940, together with the exhibits and documents referred to therein, and after hearing Benjamin Siegel, attorney for the Trustee, by Benjamin Brownstein, of counsel, in support of said petition to review, and William C. Chanler, Esq., Corporation Counsel of the City of New York, in

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Order of Clancy, D. J., Dated August 16th, 1940.

opposition thereto, by Morris L. Heath, Esq., of counsel, and upon filing the opinion of the undersigned dated August 8th, 1940, and due deliberation having been had thereon, and good and sufficient reason appearing therefor, it is

On motion of Benjamin Siegel, attorney for the Trustee herein,

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ORDERED, that said petition to review be and the same is hereby in all respects granted, and the aforesaid order of Hon. Robert P. Stephenson, Referee in Bankruptcy, dated June 17th, 1940, be and the same is hereby reversed; and it is further,

ORDERED, that the claim of The City of New York for Sales Taxes herein be and the same is hereby allowed as a general claim against this estate in the sum of \$796.00; and it is further

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ORDERED, that the claim of The City of New York for Business Taxes be and the same is hereby allowed as a priority claim against this estate in the sum of \$323.56 with interest thereon at the rate of 6% per annum from April 1st, 1940.

JOHN W. CLANCY,
U. S. D. J.

Notice of Appeal.

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**UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.****IN THE MATTER***of***NATIONAL STUDIOS, INC.,
Bankrupt.**

Notice is hereby given that the City of New York, claimant, hereby appeals to the Circuit Court of Appeals for the Second Circuit from that part of the order in this action, dated August 16, 1940 and entered on September 24, 1940, which reverses the order of Honorable Robert P. Stephenson, Referee in Bankruptcy, dated June 17, 1940, according priority to the claim of the City of New York for sales taxes in the sum of \$796.00, and directs that the same be allowed as a general claim against the estate herein.

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Dated, September 28, 1940.

Yours, etc.,

WILLIAM C. CHANLER,
Corporation Counsel,
Attorney for the City of New York,
Municipal Building,
Borough of Manhattan,
City of New York.

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To:

**CLERK OF THE UNITED STATES DISTRICT COURT
OF THE SOUTHERN DISTRICT OF NEW YORK.**

BENJAMIN SIEGEL, Esq.,
Attorney for Trustee,
280 Broadway,
Borough of Manhattan,
City of New York.

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Stipulation Waiving Bond for Costs.

**UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.**

IN THE MATTER*of*

**NATIONAL STUDIOS, INC.,
Bankrupt.**

No. 72936

89

IT IS HEREBY STIPULATED AND AGREED that the City of New York is not required to file a bond for costs on the appeal taken by the City of New York in this matter to the Circuit Court of Appeals for the Second Circuit from the order in this action dated August 16, 1940 and entered on September 24, 1940.

Dated, September 28, 1940.

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**BENJAMIN SIEGEL,
Attorney for Trustee.**

**WILLIAM C. CHANLER,
Corporation Counsel,
Attorney for the City of New York,
Claimant-Appellant.**

Stipulation as to Contents of Record.

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**UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SECOND CIRCUIT.**

IN THE MATTER

of

**NATIONAL STUDIOS, INC.,
Bankrupt.**

92

**THE CITY OF NEW YORK,
Claimant-Appellant,**

against

**MICHAEL FEIRING, Trustee in Bankruptcy,
Appellee.**

IT IS HEREBY STIPULATED AND AGREED that instead of serving designations as provided by Rule 75 (a) of the Rules of Civil Procedure, the parties to this appeal hereby agree, in accordance with Rule 75(f) of the Rules of Civil Procedure, that the following enumerated papers comprise the complete record and all the proceedings and evidence in this matter and constitute the papers to be printed in the Record on Appeal herein:

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1. Statement under Rule 13.
2. Notice of hearing on Trustee's objection to claim of the City of New York dated February 17, 1940, and Trustee's supporting petition, dated February 15, 1940.

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Stipulation as to Contents of Record.

3. Minutes of hearing held before Hon. Robert P. Stephenson, Referee, on April 1, 1940.

4. Opinion of Hon. Robert P. Stephenson, Referee, dated June 6, 1940.

5. Order made by Hon. Robert P. Stephenson, Referee, dated June 17, 1940.

6. Trustee's petition to review, dated June 19, 1940.

95 7. Referee's certificate on petition to review, dated June 21, 1940.

8. Proof of claim of City of New York, dated March 20, 1939.

9. Opinion of Hon. John W. Clancy, District Judge, dated August 8, 1940.

10. Order made by Hon. John W. Clancy, District Judge, dated August 16, 1940, and entered September 24, 1940.

11. Notice of Appeal of City of New York, dated September 28, 1940 and filed October 3, 1940.

96 12. Stipulation waiving bond for costs, dated September 28, 1940.

Dated, October 25, 1940.

BENJAMIN SIEGEL,
Attorney for Trustee.

WILLIAM C. CHANLER
Corporation Counsel,
Attorney for City of New York,
Claimant-Appellant.

Stipulation as to Record.

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**UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.****IN THE MATTER***of***NATIONAL STUDIOS, INC.,
Bankrupt.****Stipulation on
Appeal Record**

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**IT IS HEREBY STIPULATED AND AGREED that the foregoing is
a true and correct transcript of the complete record and all
the proceedings and evidence in the District Court in the
above-entitled cause.**

Dated, November 6th, 1940.

**BENJAMIN SIEGEL,
Attorney for Trustee.**

**WILLIAM C. CHANLER,
Corporation Counsel,
Attorney for the City of New York,
Claimant-Appellant.**

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Clerk's Certificate.**UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.****IN THE MATTER****of****NATIONAL STUDIOS, INC.,****Bankrupt.**

101

I, GEORGE J. H. FOLLMER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of said District Court in the above-entitled matter as agreed on by the parties.

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IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, on the 6th day of November, in the year of our Lord One thousand nine hundred and forty and the independence of the United States One hundred and sixty-four.

GEORGE J. H. FOLLMER,
Clerk.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT, OCTOBER TERM, 1940

No. 171

(Argued January 15, 1941. Decided March 17, 1941)

In the Matter of NATIONAL STUDIOS, INC., Bankrupt

THE CITY OF NEW YORK, Claimant-Appellant,
against

MICHAEL FEIRING, Trustee in Bankruptcy, Appellee

Appeal from an order of the District Court for the Southern District of New York denying priority to a claim filed against the estate of a bankrupt. Affirmed.

Before Swan, Chase and Clark, Circuit Judges

Benjamin Siegel, Attorney for Trustee-Appellee.

William C. Chanler, Corporation counsel, Attorney for Claimant-Appellant; Paxton Blair, Sol Charles Levine and Morris L. Heath, of Counsel.

OPINION

CHASE, Circuit Judge:

The City of New York filed its claim against the estate of National Studios, Inc., a bankrupt, adjudicated in the District Court for the Southern District of New York, for taxes on sales of tangible personal property imposed by local laws for the period beginning December 10, 1934 and ending January 10, 1939. Priority was claimed under Sec. 64 (a) (4) of the Bankruptcy Act and the claim, the amount of which has been adjusted by agreement and stipulated, was granted priority by the referee and so allowed. On review the district court denied priority and this appeal raises only that issue. It was also stipulated that only part of the amount of the claim was for taxes actually collected by the bankrupt from its vendees; the remainder being for what the bankrupt failed to collect though required so to do.

The local laws involved are known as No. 20 of 1934, as amended; No. 29 of 1935; No. 31 of 1936; No. 20 of 1937 and No. 21 of 1938. Whether or not the claim is entitled

to priority depends upon whether under their provisions the bankrupt was liable to the City as a taxpayer who owes a tax or as a tax collector who owes as a debt the amount of taxes collected or to be collected. *Nolte v. Hudson Nav. Co.*, 8 F. (2d) 859 (C. C. A. 2); *United States v. Balt. & Ohio R. R. Co.*, 17 Wall. 322; *Commonwealth of Pennsylvania v. York Silk Mfg. Co.*, 192 Fed. 81; *In re Goldstein*, 13 Fed. Supp. 991; *In re Waller*, 142 Fed. 883. These local laws are all substantially alike except that the 1938 law, which became effective on July 1, in that year contained the phrase "the vendor shall be liable for the collection thereof and for the tax" which was new language but merely stated more concisely what was the effect of the prior laws and the appellant does not rely upon that change for any distinction between what is due under the 1938 law and the ones previously in effect.

The first law which is Local Law No. 20 of 1934 (erroneously given number 21 in the compilation published at Albany) as amended by Local Law No. 24 (erroneously numbered 25 in the compilation) is typical of all and the entire claim will be treated as though it were based on taxes assessed thereunder.

In section 2 a tax is imposed under receipts from every sale of tangible personal property sold at retail in the City of New York and it is provided that the tax shall be stated and charged separately from the sale price when the sale is made or evidence of it issued and "shall be paid by the purchaser to the vendor for and on account of the City of New York, and the vendor shall be liable for the collection" The vendor is given the same right in respect to the collection of the tax from the purchaser "as if the tax were a part of the purchase price of the property . . . and payable at the time of the sale." In section 4 the vendor is required to keep records of receipts from sales and of the taxes payable thereon and in section 5 the duty is placed upon him to file returns quarterly or otherwise as the comptroller may permit or direct. Section 6 deals with the payment of the taxes. It provides that each vendor shall, at the time of filing a return pay the taxes to the comptroller upon the receipts required to be included in such return and that all taxes for the period for which a return is required to be filed shall be due from the vendor and payable to the comptroller whether or not a return is filed and whether or not, if filed, the return

is correct. The comptroller is empowered to compel "any vendor required to collect the tax imposed by this local law" to furnish an approved bond "to secure the payment of any tax and/or penalties due or which may become due from such vendor," or require a deposit to be made in lieu of the filing of a bond. Section 7 relates to the procedure for determining the amount due and section 8 provides that "whenever any vendor or purchaser shall fail to collect and pay over any tax and/or to pay any tax or penalty imposed by this local law, as in this local law provided, the corporation counsel shall, upon request of the comptroller, bring an action to enforce the same." An alternative remedy against both the vendor and purchaser by levy upon property is also provided. And in section 3 the Comptroller is authorized to relieve the vendor from the duty of collecting the tax from the purchaser on small sales and to the extent that taxes are payable on that score we reserve decision as this record does not show that any such taxes were claimed. Whenever the vendor failed to collect the taxes from the purchaser as the law required, the taxes were made payable also by the purchaser directly to the Comptroller but in all other instances the vendor was alone made liable for their payment to the Comptroller; the duty of the purchaser being to pay the vendor.

We first had occasion in *re Lazaroff*, 84 F. (2d) 982 to decide whether this local law imposed upon the vendor taxes which should be allowed as a prior claim against the estate of a bankrupt vendor and held that it did not. We also held that no debt was thereby created which was entitled to priority because accorded priority in payment under state law. Certiorari was at first denied. *New York City v. Goldstein, Trustee*, 299 U. S. 583. Following that, the New York Court of Appeals held in *Matter of Atlas Television Co.*, 273 N. Y. 51 that where a general assignment for the benefit of creditors was made under state law a claim of the City of New York for sales taxes was entitled to priority. At that time, though not now, a claim given priority under state law was entitled to priority under the Bankruptcy Act and certiorari was then granted in *In re Lazaroff*, supra, with the result that our decision was reversed on the authority of *Matter of Atlas Television Co.*, supra. *New York City v. Goldstein, Trustee in Bankruptcy*, 299 U. S. 522. Apparently it was not held in the *Atlas Television* case that it was necessary to be entitled

to priority under state law that the claim be one for taxes imposed upon the vendor. As it was based upon an obligation making the vendor liable for the payment to the city which exercised sovereign power in creating the obligation, priority did not depend upon whether the vendor or the purchaser was taxed. So long as the vendor was bound to pay whether he collected the tax from the purchaser or not a claim based upon his default in the payment of whatever might be due the city on account of such taxes was to be given priority upon the principle that the sovereign is to be given a preference over other creditors in insolvency proceedings. *Matter of Carnegie Trust Co.*, 206 N. Y. 390. Decision in the *Atlas Television* case did not necessarily depend upon the actual taxation of the vendor for the issue was broadly one of priority only and that it was not based upon any holding that the vendor was made liable for taxes as such is made even clearer by later decisions of the same court. *Kesbec, Inc. v. McGoldrick*, 278 N. Y. 293; *Merchants Refrigerating Co. v. Taylor*, 275 N. Y. 113. In the opinion in the last mentioned case it is said in reference to the *Atlas Television* case that "that decision did not hold that the Sales Tax is imposed on the vendor but only that he is under a duty to pay the tax to the City whether or not the vendor collects from the purchaser."

For the reasons stated, we think our decision in *In re Lazaroff*, supra, in so far as it held that such a claim as that here presented was not entitled to priority under the Bankruptcy Act as one for taxes legally due and owing by the bankrupt to the subdivision of a state was not changed by the decision in *New York City v. Goldstein in Bankruptcy*, 299 U. S. 522; and the district court correctly treated it as the law in this circuit. See also, *McGoldrick v. Berwin-White Co.*, 309 U. S. 33; *Gulf Oil Corporation v. Grady*, 110 F. (2d) 178 (C. C. A. 2).

Order affirmed.

Clark, C. J. dissents with memorandum.

DISSENTING OPINION

CLARK, Circuit Judge (dissenting):

I think the amendment of Bankruptcy Act, § 64, sub. a, by the Chandler Act did not lessen the force of *New York City v. Goldstein*, 299 U. S. 522, for that upheld the city's claim to priority by merely citing *In re Atlas Television Co.*,

273, N. Y. 51, 6 N. E. 2d 94, which had sustained a like priority in state assignment proceedings expressly upon the ground that it was a tax claim. In the Atlas case the court rejected any other basis for priority on the authority of *Matter of Northern Bank of New York*, 163 App. Div. 974, 148 N. Y. S. 70, affirmed 212 N. Y. 608, 106 N. E. 749, and then said of our decision in *Matter of Lazaroff*, 2 Cir., 84 F. 2d 982 (reversed in *New York City v. Goldstein*, supra), which had denied priority: "We might agree with that conclusion if the local law did not contain other provisions which indicate that the obligation imposed upon the vendor is in the nature of a tax. . . . We must look to the substance of the obligation. From that point of view it seems clear that the city is entitled to a priority. It has imposed a tax as sovereign and to meet a need which concerns the welfare of the state. It has provided that the vendor of property must pay the tax to it. . . . The local law provides that the 'vendor shall pay the tax,' and the city is entitled as sovereign to priority for such payment."

This seems to me clear enough; I do not believe its force is impugned by later analyses of the ultimate incidence of the tax—as on the purchaser—to avoid claims of double or extraterritorial taxation, *Merchants Refrigerating Co. v. Taylor*, 275 N. Y. 113, 124, 9 N. E. 2d 799; *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, or the wind-fall of a refund of a tax improperly collected. *Kesbec, Inc. v. McGoldrick*, 278 N. Y. 293, 16 N. E. 2d 288.

In actual fact the obligation of the vendor has all the characteristics of a tax: an absolute duty to pay, regardless of his failure to collect; a liability for all taxes, even though he need not collect on sales less than 12 cents (as established by the Comptroller's Regulations authorized by the law); and enforcement against him by suit or tax distraint. I do not see why this is not properly a tax levy against both vendor and purchaser, as seems the city's obvious intent, certainly so far as remedies are concerned. But whomever this tax is said to be "on," it is evident that when it is not paid, the vendor will generally be the one proceeded against; and in that event he shall pay "the tax." I do not believe his bankruptcy changes its character. Compare *Barbee, Trustee v. Oklahoma Tax Commission*, 10 Cir., 103 F. 2d 114, affirming *In re Kanaly*, D. C. Okl., 23 F. Supp. 995; 18 N. Y. U. L. Q. Rev. 135; 40 Col. L. Rev. 1241, 1245.

IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND
CIRCUIT

Present: Hon. Thomas W. Swan, Hon. Harrie B. Chase,
Hon. Charles E. Clark, Circuit Judges.

In the Matter of NATIONAL STUDIOS, INC., Bankrupt

THE CITY OF NEW YORK, Appellant

JUDGMENT—Filed March 19, 1941

Appeal from the District Court of the United States for the
Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[File endorsement omitted.]

Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 14, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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